

①

**05-1608**

Supreme Court, U.S.

FILED

APR 4 1996

CLERK

No. \_\_\_\_\_

**In The  
Supreme Court of the United States  
October Term, 1995**

LOU MCKENNA, Director, Ramsey County  
Department of Property Records and Revenue;  
JOAN ANDERSON GROWE, Secretary of  
State, State of Minnesota,

*Petitioners,*

vs.

TWIN CITIES AREA NEW PARTY,

*Respondent.*

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

HUBERT H. HUMPHREY III  
Attorney General  
State of Minnesota

PETER M. ACKERBERG  
Assistant Attorney General  
*Counsel of Record*

1100 NCL Tower  
445 Minnesota Street  
St. Paul, MN 55101  
Telephone: (612) 282-5717

*Counsel for Petitioners*

60 PP

**QUESTION PRESENTED**

Can a state constitutionally prohibit a candidate from filing for elective office under the banner of more than one political party?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	7
I. The Decision Of The Eighth Circuit Directly Conflicts With The Decision Of The Seventh Circuit And Decisions Of State Courts.....	7
II. The Validity Of Cross-Filing Bans Raises An Important Question.....	11
III. The Decision Of The Court Of Appeals Is Erroneous.....	12
A. The Cross-Filing Ban Imposes A Reasonable, Nondiscriminatory Burden In Light Of <i>Storer</i> .....	12
B. The State's Important Interests Are Advanced By Its Ban On Cross-Nominations.....	15
C. The Ban On Cross-Filing Survives Heightened Scrutiny.....	19
CONCLUSION.....	20

## TABLE OF AUTHORITIES

	Page
FEDERAL DECISIONS	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	4, 5, 14
<i>Burdick v. Takushi</i> , 112 S.Ct. 2059 (1992).....	14, 15
<i>Eu v. San Francisco County Democratic Central Committee</i> , 489 U.S. 214 (1989).....	5, 7, 17
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971).....	16
<i>Maher v. Roe</i> , 432 U.S. 464 (1977).....	3
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986).....	16, 17
<i>Storer v. Brown</i> , 415 U.S. 724 (1974).....	<i>passim</i>
<i>Swamp v. Kennedy</i> , 950 F.2d 383 (7th Cir. 1991), <i>cert. denied</i> , 112 S.Ct. 2992 (1992).....	<i>passim</i>
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986).....	14
DECISIONS OF OTHER JURISDICTIONS	
<i>In re Street</i> , 451 A.2d 427 (Pa. 1982).....	10
<i>Packrall v. Quail</i> , 411 Pa. 555, 192 A.2d 704 (1963)....	16
<i>Ray v. State Election Board</i> , 422 N.E.2d 714 (Ind. Ct. App. 1981).....	10
U.S. CONSTITUTION	
U.S. Const. amend. XIV, § 1.....	1, 12
U.S. Const. amend. I.....	1, 12

## TABLE OF AUTHORITIES - Continued

	Page
FEDERAL STATUTES	
28 U.S.C. §§ 1331 and 1343(a)(3) and (4) .....	3
28 U.S.C. § 1254(1) .....	1
MINNESOTA STATUTES	
Minn. Stat. § 200.02, subd. 7 (1994) .....	3, 18
Minn. Stat. § 204B.04, subd. 2 (1994) .....	2, 3
Minn. Stat. § 204B.06, subd. 1(b) (1994) .....	2
Minn. Stat. § 204B.09, subd. 1 (1994) .....	13, 19
Minn. Stat. § 204D.05 (1994) .....	3
Minn. Stat. § 204D.13 (1994) .....	18
SECONDARY AUTHORITIES	
William R. Kirschner, Note, <i>Fusian and the Associational Rights of Minor Political Parties</i> , 95 Colum. L. Rev. 683 (1995) .....	11
MISCELLANEOUS	
Election Division, Secretary of State, The Minnesota Legislative Manual: 1995-1996 (n.d.) .....	18
Minnesota Senate File No. 2720, § 10 .....	3

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

---

**OPINIONS BELOW**

The opinion of the court of appeals (App. 1-11, *infra*) is reported at 73 F.3d 196. The opinion of the district court (App. 12-25, *infra*) is reported at 863 F. Supp. 988.

---

**JURISDICTION**

The court of appeals entered its judgment on January 5, 1996 (App. 1, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

U.S. Const. amend XIV, § 1 provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 204B.04, subd. 2 (1994) provides:

No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.12, subdivision 4.

Minn. Stat. § 204B.06, subd. 1(b) (1994) provides:

An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

...

(b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election . . . .

### STATEMENT OF THE CASE

Respondent Twin Cities Area New Party ("New Party"), a minor political party under Minnesota law, sued petitioners<sup>1</sup> ("State") in August 1994 in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28

<sup>1</sup> Petitioners McKenna and Growe are county and State election officials, respectively. Petitioners' Appendix ("App.") at 3.

U.S.C. §§ 1331 and 1343(a)(3) and (4). Petitioners' Appendix ("App.") at 27.

The New Party decided to nominate incumbent Rep. Andy Dawkins as its candidate for a seat in the Minnesota House of Representatives. App. 28. However, Rep. Dawkins was also an unopposed legislative candidate for the same House seat in the primary election of the Minnesota Democratic-Farmer-Labor Party ("DFL"), one of the State's major parties. App. 27-28.<sup>2</sup> He was thus assured of being the DFL nominee. App. 2.

Candidates for election may not appear on the election ballot more than once. Minn. Stat. §§ 204B.04, subd. 2 and 204B.06, subd. 1(b) (1994); App. 34. Accordingly, election officials rejected the New Party's attempt to place Rep. Dawkins, who had previously filed as a candidate for the DFL nomination, on the general-election ballot as the New Party nominee. App. 2. The question presented here is whether the Constitution requires states to permit cross-filing or multiple party nominations.<sup>3</sup>

<sup>2</sup> A major political party is one that has evidenced significant voter support. See Minn. Stat. § 200.02, subd. 7 (1994) (setting forth voting and petition requirements for major-party status). Major parties are required, among other things, to conduct primary elections to nominate their candidates. Minn. Stat. § 204D.05 (1994).

<sup>3</sup> The 1996 Minnesota Legislature recently approved a bill permitting defined minor political parties to cross-file only if the Eighth Circuit decision is not reversed or stayed or if the court's mandate is not recalled. Minnesota Senate File No. 2720, § 10 (presented to Governor on March 30, 1996); App. 35. Legislation such as Senate File 2720, enacted only for the purpose of interim compliance with a court's judgment, does not moot an appeal. *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977).

The district court granted the State's summary judgment motion, relying in part on *Swamp v. Kennedy*, 950 F.2d 383 (upholding Wisconsin ban on cross-filing), *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992). App. 21-22, 25. It first rejected the State's argument that resolution of the case is governed by *Storer v. Brown*, 415 U.S. 724 (1974). App. 18. The district court characterized *Storer* as a challenge to a "sore loser" statute designed to prevent intra-party squabbles from being waged by self-described "independents" in the general election. App. 19. In contrast, Rep. Dawkins was not a sore loser but rather a "willing participant" in an effort to be nominated by both the DFL and the New Party, the district court asserted. *Id.*

Instead of relying on *Storer*, the district court reviewed the State's cross-filing ban under the three-part legal analysis set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). App. 16-17. First, in considering the "character and magnitude" of the restriction, the district court concluded that prohibiting cross-filing is not a "severe" restriction but a "minimal burden" on the New Party's First Amendment rights. App. 21, 23. The district court noted that the cross-filing ban does not prevent the New Party from nominating a candidate. App. 20. Instead, the ban, by preventing cross-filing, merely prevented New Party followers from "hitching their political cart to another party's star." App. 21.

The court then addressed the second part of the *Anderson* test by identifying and evaluating the precise interests advanced by the State for the restriction. App. 21-23. It found the State's interest in avoiding voter confusion and seating candidates who win at least a plurality

of votes in the general election as one party's nominee to be compelling. *Id.* The court concluded that the appearance of a candidate's name more than once under different party labels will result in voter confusion and create unequal treatment of candidates. App. 22.

The district court then engaged in the final step of the *Anderson* analysis by weighing the minimal burden imposed by the cross-filing ban on the New Party's First Amendment rights against the compelling interests advanced by the State for the ban. App. 23-25. It concluded that the cross-filing ban "is a valid and non discriminatory regulation of the electoral process," App. 23, and would be upheld even under the "stricter scrutiny" required of election statutes that, unlike those at issue, exclude a party or candidate from the ballot. App. 24. The mechanics of choosing candidates and counting votes is best left to legislative determination, the court added. App. 24-25.

The court of appeals reversed the district court after analyzing the ban on cross-nominations under the standards set forth in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). App. 5. It held that the cross-filing ban imposes a "severe" burden on the New Party's associational rights "because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." App. 6. The cross-filing ban was characterized as hindering the New Party's effort to establish itself as a "durable, influential player in the political arena" by forcing it "to make a no-win choice. In the absence of cross-filing, New Party

members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all." *Id.*

The State's ban on cross-filing "is broader than necessary to serve the State's interests . . . ," the court of appeals asserted. *Id.* The State's concern with major party splintering is curable by requiring the major party's consent for multiple nominations, and its concern with voter confusion can be remedied by simple ballot instructions, according to the court of appeals. App. 7-8. The remaining State concerns – the potential problem of overcrowded ballots and uncertainty about how to determine the winning candidate – were dismissed as "simply unjustified." App. 9. The State's concern with ballot overcrowding is sufficiently satisfied by statutory requirements for demonstrating minimal support before a candidate is placed on the ballot, the court of appeals stated. *Id.* In addition, the State's concern with counting ballots to determine the winning candidate is not advanced by banning multiple-party nominations, the court concluded. *Id.* The court of appeals found nothing remarkable about aggregating votes cast for a candidate appearing on the ballot as the nominee of more than one political party. *Id.*

The court acknowledged that its decision conflicts with *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991) (upholding Wisconsin cross-filing ban), *cert. denied*, 112 S. Ct. 2992 (1992); App. 10. It noted that the *Swamp* court did not decide whether Wisconsin's law could have been more narrowly tailored. *Id.*

---

## REASONS FOR GRANTING THE PETITION

The resolution by the Eighth Circuit of the question presented directly conflicts with the Seventh Circuit's *Swamp* decision, thereby creating a split in the circuits. In addition, the decision below casts doubt on the validity of election laws in 40 states that directly or indirectly ban cross-nominations. Finally, the decision below is erroneous.

### I. The Decision Of The Eighth Circuit Directly Conflicts With The Decision Of The Seventh Circuit And Decisions Of State Courts.

The decision below directly conflicts with the Seventh Circuit decision in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992).

The Seventh Circuit in *Swamp* considered a constitutional challenge by the Labor-Farm Party ("LFP") to "Wisconsin's statutory ban on 'multiple-party nominations,' which prohibits a candidate from being nominated by more than one party for the same office in the same election." 950 F.2d at 384. The LFP, like the New Party here, sought to nominate a candidate who filed in the primary election of an established party. *Id.* In contrast to the ruling of the Eighth Circuit, the court in *Swamp* unanimously upheld the state law in two separate opinions based on different rationales.

Two of the three judges on the Seventh Circuit panel assessed the constitutionality of the ban on cross-filing under the *Eu* standards. *Swamp*, 950 F.2d at 385. The majority noted that the ban merely denied the LFP the

right to nominate "a candidate who has previously been placed on the primary ballot of another party." *Id.* Because the LFP could "nominate any candidate that the party can convince to be *its* candidate," the restriction was not considered to be a "substantial burden" on the LFP's opportunity for political advancement. *Id.* (emphasis in original). In short, "[t]he Labor-Farm Party has no right to associate with a candidate who has chosen to associate with another party." *Id.*

The *Swamp* majority rejected the LFP's argument, embraced in this case by the Eighth Circuit, that the ban hinders the efforts of third parties to compete by preventing coalitions with other parties. *Id.*; *New Party*, App. 6. Instead, the *Swamp* majority concluded that "[a]llowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to choose their own candidates promotes competition." *Swamp*, 950 F.2d at 384 (footnote omitted). The court found that the cross-filing ban created no burden on the efforts of a minority party to publicize its views, broaden its base of support, support the nominee of another party or choose another candidate to express its views. *Id.* at 386.

Even if the restriction did burden the LFP's associational rights, the burden is justified by compelling state interests, the *Swamp* majority added. *Id.* In the absence of the ban, "serious confusion for voters" would result from the "unlimited number of minority parties [that] could nominate the candidate of a major party for the same office. . . ." *Id.* Voters could not easily distinguish between parties presenting the same candidate. *Id.*

The *Swamp* majority also found a compelling interest in "preserving the integrity of its election process" by preventing fraudulent candidacies, such as when an unpopular minority party nominates the candidate of a major party in order to encourage the major party's defeat. *Id.* The State's interest in maintaining a stable political system justifies a ban that "limits involuntary fusion of political parties." *Id.*<sup>4</sup>

In a concurring opinion, one judge on the three-judge *Swamp* panel found that this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), compelled validation of Wisconsin's ban on cross-filing. *Swamp*, 950 F.2d at 388 (Fairchild, Sr. Cir. J., concurring). He rejected avoiding voter confusion and preserving the integrity of the election process as compelling interests advanced by the ban on cross-filing. *Id.* at 387. However, in *Storer*, the Court recognized the State's compelling interest in maintaining a stable political system, and "maintaining the distinct identity of parties can be viewed as one facet" of that interest, the concurring judge stated. *Swamp*, 950 F.2d at 388. It is at least "arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party . . . [and] the prohibition against cross-filing does

---

<sup>4</sup> The *Swamp* majority noted the district court's recognition of the State's "legitimate interest" in assuring that a majority or at least a plurality primary candidate advance to the general election. 950 F.2d at 386. In the absence of a cross-nomination ban, a candidate running for multiple party nominations could lose each party primary despite obtaining an aggregated majority vote. *Id.*

advance that interest," the concurring judge concluded. *Id.* at 387-88.

The original panel judges denied a petition for rehearing. *Id.* at 388. The Seventh Circuit, by a 7-3 majority, denied a petition for rehearing *en banc*. *Id.* (Ripple, Posner and Easterbrook, JJ., dissenting). There was no *en banc* majority opinion. The *en banc* dissenters characterized the ban as a "broad and severe regulation," asserted that cross-filing increases opportunities for voters and parties "to be heard and for workable political alliances to be formed" and stated that the state's compelling interest in avoiding voter confusion could be advanced by less restrictive alternatives than a ban on cross-filing. *Id.* at 389.

Thus, the Eighth Circuit decision in the instant case striking down Minnesota's ban on multiple-party nominations is in direct conflict with the Seventh Circuit's decision to uphold Wisconsin's similar statute in *Swamp*. Moreover, the divergent panel and *en banc* opinions in *Swamp* demonstrate the potential for additional discordant decisions as this issue is inevitably litigated in other circuits.

In addition to creating a circuit split, the Eighth Circuit decision is at odds with state appellate court decisions on the validity of prohibiting cross-filing. See, e.g., *In re Street*, 451 A.2d 427, 432 (Pa. 1982) (requirement prohibiting nomination of candidate already on ballot imposes no unfair or unnecessary burden on minority party); *Ray v. State Election Board*, 422 N.E.2d 714, 722 n.12

(Ind. Ct. App. 1981) (state may prevent cross-filing under *Storer*).<sup>5</sup>

## II. The Validity Of Cross-Filing Bans Raises An Important Question.

The validity of cross-filing bans raises an important question requiring resolution in light of the pervasiveness of such restrictions among the states, legal uncertainty created by the *New Party-Swamp* circuit split and the divergent *Swamp* opinions. The election laws of 40 states and the District of Columbia reportedly directly or indirectly ban cross-filing in federal and state elections. William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683, 685 n.14 (1995). It is inevitable, in light of the Eighth Circuit's departure from *Swamp* and state court decisions upholding cross-filing bans, that additional litigation on the question presented will ensue. There is an urgent need for this Court's guidance on the question in light of the uncertainty created by the Eighth Circuit's decision and the importance of clarity in planning for and conducting elections. Further percolation of the question presented through the appellate courts is undesirable. See *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (Supreme Court review in ballot-access cases "will have the effect simplifying future challenges, thus increasing the likelihood

<sup>5</sup> See also William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683, 688-89 & n.37 (citing prior state court decisions upholding cross-filing bans).

that timely filed cases can be adjudicated before an election is held.").

### III. The Decision Of The Court Of Appeals Is Erroneous.

A further reason to grant the petition is that the decision of the court of appeals conflicts with *Storer v. Brown*, 415 U.S. 724 (1974), and this Court's ballot access principles.

#### A. The Cross-Filing Ban Imposes A Reasonable, Nondiscriminatory Burden In Light Of *Storer*.

The ballot-access restrictions upheld in *Storer* are substantially more severe than a cross-filing ban. However, the court of appeals erred by virtually ignoring *Storer*.

In *Storer*, the challenged statute prohibited candidates from being nominated as independents in the general election, if affiliated with a qualified political party within one year prior to the primary election, thereby creating "an absolute bar to candidacy." *Storer*, 415 U.S. at 726, 737. Two of the *Storer* plaintiffs wanted to run for Congress in the 1972 general election as independents, but were barred because they were registered Democrats until January and March, 1972. *Id.* at 728. They challenged the disaffiliation statute on the grounds that it posed an unconstitutionally severe burden upon the right to vote and associate for political purposes under the First and Fourteenth Amendments. *Id.* at 729.

A ban on cross-filing is a reasonable nondiscriminatory restriction compared to the party disaffiliation statute applicable to independent candidates upheld in *Storer*. First, the disaffiliation statute challenged in *Storer*, when applied to parties, barred a minor party from nominating not only a current candidate of another party, but also anyone merely affiliated with any other party in the recent past.<sup>6</sup> It barred a minor party from considering thousands of possible candidates as potential nominees because they were registered members of the Democratic, Republican, or other parties. However, in this action, the challenged cross-filing ban bars the New Party from nominating only a handful of persons – Rep. Dawkins and any additional nominees of other parties for the same seat.

Second, the upheld disaffiliation statute, when applied to parties, required a minor party to begin its search for a candidate more than 17 months before the general election. *Storer*, 415 U.S. at 758 (Brennan, J., dissenting). Here, however, the New Party has until July of the election year to persuade a potential candidate affiliated with another party to be its candidate. Minn. Stat. § 204B.09, subd. 1 (1994) (filing period for nominating petitions).

Finally, the statute challenged in *Storer* operated as "an absolute ban to candidacy" for many potential candidates. *Storer*, 415 U.S. at 737. In contrast, the cross-filing ban here does not ban anyone from the ballot. It only bars

---

<sup>6</sup> The challenged disaffiliation statute was part of a regulatory scheme that also required party candidates to disaffiliate. *Storer*, 415 U.S. at 733.

Rep. Dawkins or other party nominees from being listed as a candidate more than once. The Eighth Circuit did not suggest any basis for distinguishing between *Storer's* application of a disaffiliation requirement to an independent candidate and the application of a less restrictive cross-filing ban to the candidate of a minor party.

The *New Party* district court erroneously found *Storer* not dispositive because "the disaffiliation rule at issue in *Storer* was directed at 'sore losers' " and because Rep. Dawkins was not a sore loser, but "a willing participant." App. 19. However, the *Storer* plaintiffs were not "sore losers." They were simply Democratic Party members, rather than defeated Democratic Party primary participants. 415 U.S. at 728. If *Storer* only prevents sore loser candidates, it would not apply to the *Storer* plaintiffs. This Court has never questioned the continuing validity of *Storer*, nor given any indication that it intended *Storer* to apply only to the "sore loser" situation. Thus, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court recognized the validity of a disaffiliation statute which still permits an independent-minded group or a minor party to gain access to the ballot with some candidate. *Id.* at 719 n.12. See also *Burdick v. Takushi*, 112 S. Ct. 2059, 2063-67 (1992) (citing *Storer* in upholding Hawaii ban on write-in votes) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 n.13 (1986) (citing state interest upheld in *Storer*.)

The court of appeals erred, in light of *Storer*, by characterizing the ban on cross-filing as a "severe" restriction on the New Party's associational rights. *Storer* requires a holding that the State's cross-filing ban imposes only a reasonable, nondiscriminatory burden on the New Party's associational rights.

#### **B. The State's Important Interests Are Advanced By Its Ban On Cross-Nominations.**

The court of appeals, based on its erroneous "severe" characterization of the burden imposed on the New Party, would improperly require the State to adopt "less restrictive ways" to avoid the party splintering and voter confusion created by cross-filing. App. 7-8. However, the State is not required to achieve its important interests by the most narrow means when it imposes reasonable ballot access restrictions. "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' " on protected First and Fourteenth Amendment rights, " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 112 S. Ct. at 2063 (1992) (citation omitted). In this case, the State's important interests amply justify the ban on cross-filing.

The Court recognizes that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Storer*, 415 U.S. at 736. Cross-filing invites splintering and factionalism by making it possible for the various separate political interests that coalesce into a political party to separately demonstrate their individual voter appeal. Thus, for example, the pro-life, lower tax and fair minimum wage wings of a party may all separately nominate the party's nominee under appealing ballot slogans when cross-filing is permitted. This turns the general-election ballot into a forum for venting intraparty squabbles by creating competition among the various party interests. Such competition may properly be confined to the primary election. See *Storer*, 415 U.S. at 735 (recognizing legitimacy of state policy to

avoid making general election ballot "a forum for continuing intraparty feuds.").

The court of appeals suggested that factionalism could be avoided merely by requiring consent of the major party and its nominee before a minor party can nominate the candidate of a major party. App. 7. However, the State is not constitutionally required to enact a consent requirement. It may simply ban cross-filing because it does not impose a "severe" burden on the New Party's rights and is a regulation that reasonably promotes the State's important interest in minimizing factionalism.

The court of appeals also erred in suggesting that the State could avoid voter confusion caused by cross-filing by providing simple explanations in ballot directions. App. 8. This Court recognizes that the state has a compelling interest in avoiding voter confusion. *Storer*, 415 U.S. at 732; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The state has legitimate interests in fostering a simple ballot to avoid voter confusion. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986). Thus, the state has a compelling interest in presenting a simple ballot in which there is a one-to-one alignment between candidates and parties. Cf. *Packrall v. Quail*, 411 Pa. 555, 557, 192 A.2d 704, 706 (1963) (without state regulation, general election ballot may become "cluttered by candidates who are seeking to multiply the number of times their names appears on the ballot under various and inviting labels."). Simple ballot directions might or might not prevent voter confusion created by cross-filing. However,

[t]o require States to prove actual voter confusion . . . as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshalled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

*Munro*, 479 U.S. at 195-96.

The cross-filing ban is also justified by the State's interest in providing a fair and honest election process, even if its regulation interferes with internal party affairs. *Eu*, 489 U.S. at 231 (citing *Storer*, 415 U.S. at 730). The State's regulation prevents three types of fraudulent or improper manipulation of the ballot: 1) creation of new political parties simply to increase a candidate's access to the ballot; 2) "raiding" of vulnerable new major parties to gain short-term political advantage; and 3) nomination of a popular major party candidate by a minor party simply to gain the status of a major party.

First, as noted above, cross-filing enables a candidate to manipulate the ballot to his advantage by having his name placed on the ballot innumerable times under various appealing slogans masquerading as political parties. Second, cross-filing exposes a new but relatively weak major party to "raiding" by an established major party. An established major party may decide that it would be

to its advantage for its nominee to also appear on the ballot as the nominee of the Independence Party of Minnesota.<sup>7</sup> If the Independence Party is relatively small, supporters of the established major party candidate could outvote supporters of the Independence Party's "real" candidate in the Independence Party primary.

Finally, a minor party could use cross-filing solely to achieve status as a "major political party" without offering voters an additional candidate choice. A minor party can use cross-filing to nominate a popular major-party candidate. It is elevated to major-party if five percent of the electorate votes for that candidate on the ballot line of the minor party and the party gets votes in each county. Minn. Stat. § 200.02, subd. 7(a) (1994). By this method, cross-filing allows the former minor party to get a preferred place on the general election ballot in the next election for all of its candidates without having to submit nominating petitions. Minn. Stat. § 204D.13 (1994).

Each of the ballot manipulations described above is driven by the "short-range political goals" of candidates, their supporters, or political parties. The state has a legitimate interest in thwarting such goals when they conflict with the State's interest in assuring fair and honest elections and add nothing to electoral competition among

---

<sup>7</sup> The Independence Party recently gained major party status in Minnesota. See Minn. Stat. § 200.02, subd. 7(a) (1994) (defining major party as party whose candidate obtains votes in each county and five percent of vote); Election Division, Secretary of State, The Minnesota Legislative Manual: 1995-1996 at p. 368-89 (n.d.) (showing Independence Party candidate for U.S. Senate received required vote distribution and percentage for major party status).

different candidates. See *Swamp*, 950 F.2d at 385 ("forcing parties to choose their own candidates promotes competition.").

### C. The Ban On Cross-Filing Survives Heightened Scrutiny.

Even if the ban on cross-filing is subject to heightened scrutiny, as the court of appeals concluded, it is valid under *Storer*.

Three dissenting *Storer* justices criticized the opinion for failing to adequately examine whether "less drastic means" could have served the State's interests. *Id.* at 761 (Brennan, J., dissenting). In their view, the State's interests could be adequately served with less drastic means. *Id.* at 761-62. The less drastic means suggested by the *Storer* dissenters are incorporated in the cross-filing ban challenged here.

The first suggested less drastic means was to advance the 12-month date when disaffiliation must be effected to "significantly closer to the primaries." *Id.* at 762. Here, a minor party candidate formerly affiliated with a major party does not have to disaffiliate from the major party until the July filing period. See Minn. Stat. § 204B.09, subd. 1 (1994) (general election affidavits of candidacy and nominating petitions to be filed 56-70 days before primary). Thus, the disaffiliation requirement here is "significantly closer to the primaries" than it was in *Storer*.

The second less drastic means suggested by the *Storer* dissenters was to limit the disaffiliation requirement to

independent candidates "who actually run in a party primary." 415 U.S. at 762. The ban on cross-filing challenged here is so limited. Thus, the cross-filing ban would satisfy the "less drastic means" test required by the *Storer* dissenters. The Eighth Circuit erred in requiring additional narrowing.

---

### CONCLUSION

In light of the circuit split on the presented question, the pervasiveness of state bans on cross-filing and the Eighth Circuit's error, the Court should grant this petition.

Dated: April, 1996

Respectfully submitted,

HUBERT H. HUMPHREY III  
Attorney General  
State of Minnesota

PETER M. ACKERBERG  
Assistant Attorney General  
*Counsel of Record*

1100 NCL Tower  
445 Minnesota Street  
St. Paul, MN 55101  
Telephone: (612) 282-5717

### UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

No. 94-3417MN

---

Twin Cities Area New	*	Appeal from the United
Party,	*	States District Court for
	*	the District of Minnesota.
Appellant,	*	
	*	
v.	*	
	*	
Lou McKenna, Director,	*	
Ramsey County	*	
Department of Property	*	
Records and Revenue;	*	
Joan Anderson-Growe,	*	
Secretary of State, State	*	
of Minnesota,	*	
	*	
Appellees.	*	

---

Submitted: May 18, 1995

Filed: January 5, 1996

---

Before RICHARD S. ARNOLD, Chief Judge, and WOOD\*  
and FAGG, Circuit Judges.

---

FAGG, Circuit Judge.

---

\* The HONORABLE HARLINGTON WOOD, JR., United States Circuit Judge for the Seventh Circuit, sitting by designation.

In this case, we must decide whether Minnesota can constitutionally prevent a minor political party from nominating its chosen candidate on the ground the candidate is another party's nominee, even though the candidate consents to the minor party's nomination and the other party does not object. *See* Minn. Stat. § 204B.06 subd. 1(b) (1994); *id.* § 204B.04 subd. 2.

The facts are undisputed. In April 1994, the Twin Cities Area New Party, a legitimate minor political party under Minnesota law, *see id.* § 200.02 subd. 7, voted to nominate Andy Dawkins, the incumbent Democratic-Farm-Labor (DFL) state representative in House District 65A, as the New Party's candidate for that office in the November 1994 general election. The New Party believed Dawkins would best represent and deliver the principles of the New Party's platform. Dawkins, who faced no opposition in the upcoming DFL primary election and was thus ensured the DFL nomination, accepted the New Party's nomination and signed an affidavit of candidacy for the New Party. *See id.* § 204B.06 (requiring all candidates to file affidavit of candidacy). The DFL did not object to the New Party's nomination of Dawkins. The New Party prepared a nominating petition with the required number of signatures. *Id.* § 204B.03 (providing for minor party nomination through nominating petitions rather than primaries); *see id.* § 204B.07; *id.* § 204B.08.

When the New Party attempted to file Dawkins's affidavit and the nominating petition, however, the Secretary of State's office rejected them because Dawkins had filed an affidavit of candidacy for the DFL party, a major political party in Minnesota. Thus, Dawkins's New Party affidavit did not state he had "no other affidavit on file as

a candidate . . . at the . . . next ensuing general election," as Minnesota law requires. *Id.* § 204B.06 subd. 1(b). Dawkins's candidacy on the New Party ticket was also prohibited under a Minnesota statute that provides, with exceptions inapplicable here, "No individual who seeks nomination for any partisan . . . office at a primary shall be nominated for the same office by nominating petition." *Id.* § 204B.04 subd. 2.

After the rejection of its nominating petition, the Twin Cities Area New Party brought this action challenging the laws preventing Dawkins's nomination, and the district court upheld the laws in granting summary judgment to Minnesota Secretary of State Joan Anderson-Growe, the official in charge of administering state elections, and Lou McKenna, a Minnesota county director in charge of county elections. *Twin Cities Area New Party v. McKenna*, 863 F. Supp. 988 (D. Minn. 1994). The New Party appeals.

Although the New Party's nomination of a candidate already nominated by a major political party may appear unconventional to many present-day voters, the practice dates back to nineteenth century politics. The practice, called "multiple party nomination" or "fusion," is the nomination by more than one political party of the same candidate for the same office in the same general election. William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683, 687 (1995). A person who votes for a candidate nominated by multiple parties simply chooses between casting the vote on one party line or another. General election votes that the candidate receives on each party's line are added together to decide the overall winner. *Id.* Thus, as without

multiple party nomination, the person who receives the most votes wins the general election.

Multiple party nomination was widely practiced in state and national elections throughout the 1800s. Peter H. Argersinger, "A Place on the Ballot": *Fusion Politics and Antifusion Laws*, 85 Am. Hist. Rev. 287, 288 (1980). Following the national emergence of a third party and its extensive fusion with a major party in the 1892 presidential campaign, the parties in power in state legislatures started to ban multiple party nomination in both state and national elections to squelch the threat posed by the opposition's combined voting force. *Id.* at 302. Minnesota and about ten other states enacted the bans around 1900. *Id.* By preventing multiple party nomination, the bans ended the importance and existence of significant third parties. *Id.* at 303.

Although multiple party nomination is prohibited today, either directly or indirectly, in about forty states and the District of Columbia, the practice is still permitted in ten states, including New York. Kirschner, 95 Colum. L. Rev. at 685 nn.13 & 14. Where multiple party nomination is allowed, the practice plays a significant role in modern elections. Many prominent national, state, and city leaders, including Ronald Reagan, John F. Kennedy, Franklin D. Roosevelt, Earl Warren and Fiorello LaGuardia, have won significant elections at least partially because they appeared on the general election ballot as the candidate for a minor party in addition to a major party. *Id.* at 683 & n.2. For example, in the 1980 presidential race in New York, Jimmy Carter received more votes as a Democrat than Ronald Reagan did as a

Republican, but Reagan's additional votes on the Conservative Party line allowed him to carry the state. *Id.*

The legal standards that control our review are well-settled. A state's broad power to regulate the time, place, and manner of elections does not eliminate the state's duty to observe its citizens' First Amendment rights to political association. *Eu v. San Francisco County Democratic Cent. Comm'n*, 489 U.S. 214, 222 (1989). To decide a state election law's constitutionality, we first consider whether it burdens First Amendment rights. *Id.* If so, the state must justify the law with a corresponding interest. See *id.* When the burden on First Amendment rights is severe, the state's interest must be compelling and the law must be narrowly tailored to serve the state's interest. See *id.*; *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

Minnesota's statutes precluding multiple party nomination unquestionably burden the New Party's core associational rights. Political parties enjoy freedom "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu*, 489 U.S. at 224 (quoted case omitted). Parties have the right "to select their own candidate." *Id.* at 230 (quoting with approval *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 235-36 (1986) (Scalia, J., dissenting)). Parties also have an associational right to "broaden the base of public participation in and support for [their] activities." *Tashjian*, 479 U.S. at 214.

The burden on the New Party's associational rights is severe. The New Party cannot nominate its chosen candidate when the candidate has been nominated by another party despite having the candidate's and the other party's blessing. The State's simplistic view that the New Party

can just pick someone else does not lessen the burden on the New Party's right to nominate its candidate of choice. See *Norman*, 502 U.S. at 289 (law preventing group from using established political party's name with party's consent severely burdened group). As in *Norman*, the burden here is severe because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities. History shows that minor parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned. See Kirschner, 95 Colum. L. Rev. at 700-04. This is so because a party's ability to establish itself as a durable, influential player in the political arena depends on the ability to elect candidates to office. And the ability of minor parties to elect candidates depends on the parties' ability to form political alliances. When a minor party and a major party nominate the same candidate and the candidate is elected because of the votes cast on the minor party line, the minor party voters have sent an important message to the candidate and the major party, which gets attention for the minor party's platform. By foreclosing a consensual multiple party nomination, Minnesota's statutes force the New Party to make a no-win choice. New Party members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all.

Minnesota's ban on multiple party nomination is broader than necessary to serve the State's asserted interests, regardless of their importance. Minnesota asserts the

statutes are necessary because without them, minor party candidates would just ride the coattails of major party candidates, disrupting the two-party political system as we know it. Minnesota is concerned about internal discord within the two major parties and major party splintering. The New Party responds that to avoid these problems, Minnesota need only require the consent of the candidate and the candidate's party before the minor party can nominate the candidate. We agree. By merely rewriting the laws to require formal consent, Minnesota can address its concerns without suppressing the influence of small parties. *Norman*, 502 U.S. at 290. Minnesota has no authority to protect a major party from internal discord and splintering resulting from its own decision to allow a minor party to nominate the major party's candidate. *Tashjian*, 479 U.S. at 224. The "State . . . may not constitutionally substitute its own judgment for that of the [major] [p]arty." *Id.* Minnesota's interest in maintaining a stable political system simply does not give the State license to frustrate consensual political alliances. We realize "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," *Storer v. Brown*, 415 U.S. 724, 736 (1974), but Minnesota's concerns that all multiple party nominations would cause such ruin are misplaced. Indeed, rather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics. As James Madison observed, when the variety and number of political parties increases, the chance for oppression, factionalism, and nonskeptical acceptance

of ideas decreases. Kirschner, 95 Colum. L. Rev. at 712 n.213.

The State's concerns about voter confusion can also be dealt with in less restrictive ways. The State worries that voters would be confused at the polls by seeing a candidate's name on more than one party line. This confusion could be alleviated by simple explanations in the ballot directions to cast the ballot for the candidate on one party line or the other. The State also believes it would be difficult for the voters to understand where a candidate stands on issues when the candidate's name appears twice on a ballot, and voters will be misled by party labels. The State undoubtedly has a legitimate interest in " 'fostering informed and educated expressions of the popular will in a general election.' " *Tashjian*, 479 U.S. at 220 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983)). A consensual multiple party nomination informs voters rather than misleads them, however. If a major party and a minor party believe the same person is the best candidate and would best deliver on their platforms, multiple party nomination brings their political alliance into the open and helps the voters understand what the candidate stands for. See *Norman*, 502 U.S. at 290 (misrepresentation easily avoided by requiring established political party's formal consent to use of its name by like minded candidates).

The Supreme Court has recognized that party labels "provide a shorthand designation of the views of party candidates on matters of public concern, [and] the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise [to vote]." *Tashjian*, 479 U.S. at

220. For example, a candidate's ballot listing on the Right to Life Party ticket gives a voter more specific information about the candidate's views than a ballot listing on a major party ticket alone. Essentially, Minnesota suggests multiple party nomination would confuse voters by giving them more information. The Supreme Court teaches, however, that courts must skeptically view a state's claim that it is enhancing voters' ability to make wise decisions by restricting the flow of information to them. *Id.* at 221. Indeed, neither the record nor history reveal any evidence that multiple party nominations have ever caused any type of confusion among voters, in Minnesota or anywhere else. See Kirschner, 95 Colum. L. Rev. at 707-08 n.176.

The State's remaining concerns about multiple party nomination are simply unjustified in this case. The potential problem of overcrowded ballots is already avoided by requiring a candidate to display a minimum level of support before being placed on the ballot. See Minn. Stat. § 204B.08. The State's concern with "knowing how the winner will be determined" is not furthered by statutes preventing multiple party nomination in general elections. The winner is determined in the same way in general elections whether or not a fusion candidate is involved: the individual who receives the most votes wins. Electoral history shows there is nothing remarkable about awarding victory to a candidate who receives the most overall votes, just because the votes are cast on two lines rather than one. As noted earlier, this is how Ronald Reagan beat Jimmy Carter in the 1980 presidential race in New York.

On a final note, we recognize one federal court of appeals has addressed the constitutionality of laws preventing multiple party nomination. In *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992), two judges on a divided three-judge panel held Wisconsin's statutes banning multiple party nomination did not burden a minor political party's associational rights, and even if they did, the State's interests justified the burden. *Id.* at 386. The other panelist believed the party's rights were burdened and thought only the State's compelling interest in maintaining the distinct identities of the political parties justified the laws. *Id.* at 386-88 (Fairchild, J. concurring). On the denial of rehearing en banc, Judges Ripple, Posner, and Easterbrook dissented because they believed the panel had deviated from the Supreme Court's analysis in applying the controlling legal standards. *Id.* at 388-89. In any event, neither the majority nor the concurrence in *Swamp* decided whether Wisconsin's law could have been more narrowly tailored with a consent requirement.

We hold Minn. Stat. §§ 204B.06 subd. 1(b) & 204B.04 subd. 2 are unconstitutional because the statutes severely burden the New Party's associational rights and the statutes could be more narrowly tailored (with a consent requirement) to advance Minnesota's interests. We do not reach the constitutionality of Minn. Stat. § 204B.04 subd. 1, which states, "No individual shall be named on any ballot as the candidate of more than one major political

party," because it is not involved in this case. We reverse the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION**

---

Twin Cities Area New Party,

Plaintiff,

Civ. No. 3-94-953

vs.

**AMENDED  
ORDER AND  
MEMORANDUM**

Lou McKenna, Director, Ramsey  
County Department of Property  
Records and Revenue; Joan  
Anderson Growe, Secretary of of  
[sic] the State of Minnesota,

(Filed  
Sept. 16, 1994)

Defendants.

---

Public Interest Project of Hamline Law School and Kenneth E. Tilsen, Public Citizen Litigation Group and Cornish F. Hitchcock and Davis, Miner, Barnhill & Galland and Sarah E. Siskind appeared for and on behalf of plaintiff.

Office of the Ramsey County Attorney and Kristine Legler Kaplan and Office of the Minnesota Attorney General and Peter M. Ackenberg appeared for and on behalf of defendants.

---

This matter came on for hearing before the Honorable Michael J. Davis on September 9, 1994 on plaintiff's motion for injunctive relief pursuant to Fed. R. Civ. P. 65. Pursuant to the agreement of the parties and upon the order of the court, Fed. R. Civ. P. 65(a)(2), the matter was consolidated and hearing was had on the merits pursuant to Fed. R. Civ. P. 56. For the reasons stated herein, the summary judgment is granted on behalf of Defendants.

**I. FACTS**

In April 1994 the Twin Cities Area New Party ("New Party"), a national political organization, convened a meeting at which party members voted to nominate incumbent Minnesota State Representative Andy Dawkins as the New Party candidate for District 65A in the Minnesota House of Representatives. Although Rep. Dawkins had already filed an Affidavit of Candidacy as the candidate of the Democratic-Farmer-Labor Party (DFL) for District 65A, he expressed a willingness to accept the New Party nomination in addition to the DFL nomination.

Since the New Party does not nominate candidates in a primary, it must file a nominating petition containing the signatures of ten percent of the persons eligible to vote in the District 65A, with a minimum of 500 valid signatures. Minn. Stat. §§ 204B.03, 204B.08, Subd. 3(c) (1992).

On July 18, 1994 New Party representatives presented to the Ramsey County Department of Property Records and Revenue a nominating petition in Rep. Dawkins' behalf containing some 600 signatures.<sup>1</sup> When the New Party representatives tried to file their petition, Supervisor of Elections and Voter Registration Joan M. Pelzer informed them that Rep. Dawkins had already filed an

---

<sup>1</sup> Under Minnesota law, petitions for offices in which voters from only one county will participate must be filed with the county auditor. Minn. Stat. § 204B.09, subd. 1 (1992).

Affidavit of Candidacy as the DFL candidate. Consequently, Ms. Pelzer, citing Minn. Stat. § 204B.06, subd. 1(b),<sup>2</sup> refused to accept the New Party's petition.

As Director of the Ramsey County Department of Property Records and Revenue, Lou McKenna is responsible for the administration of Minnesota's election law in Ramsey County. Minn. Stat. §§ 204B.09, subd. 1 and 200.02, subd. 16. As such, Mr. McKenna is named as the defendant in this action. As Secretary of the State of Minnesota, Joan Anderson Growe is responsible for the administration of Minnesota's election laws and is named as a party in this action.

On August 10, 1994 Plaintiff moved the court for a preliminary injunction, alleging, *inter alia*, that those portions of the Minnesota election statute which require a party candidate to disaffiliate himself from other parties upon the filing of an affidavit of candidacy or a nominating petition are unconstitutional. *See*, Minn. Stat. §§ 204B.03 (requiring candidates for partisan offices to be nominated by either primary election or nominating petition), 204B.04, Subds. 1 (prohibiting a candidate's name from appearing on the ballot of more than one major political party), and 2 (prohibiting primary election candidates from being nominated by petition), and 204B.06, Subd. 1(b) (1992) (requiring candidates filing affidavits of

<sup>2</sup> Section 204B.06, Subd. 1 provides that "An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

(b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election. . . ."

candidacy to affirm that the candidate has filed no other affidavit of candidacy in the same primary or ensuing general election.) Defendants moved for summary judgment and plaintiffs agreed that the matter is ripe for summary judgment.

Plaintiff contends that the disaffiliation statutes infringe the associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution by prohibiting it from nominating as it's [sic] candidate the person chosen by the members.

The defendants argue that the net effect of the challenged statutes [sic] is to assure that the name of the primary election winner appears only once on the general election ballot and it insures that primary election losers do not appear at all. These interests constitute the legitimate interests which justify the burden placed upon plaintiff's associational rights.

## II. DISCUSSION

### A.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over facts that might

affect the outcome of the lawsuit according to applicable substantive law are material. *Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49. In the instant case, the parties agree that there are no issues as to the material facts; this matter concerns a question of law which makes its resolution particularly susceptible to summary judgment.

### B.

It is beyond question that the rights of the citizenry to voluntarily associate themselves for partisan political purposes is among the core values protected by the First and Fourteenth Amendments to the United State [sic] Constitution. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224, 109 S.Ct. 1013, 1020 (1989). All regulation of the election process is not, however, foreclosed by the protection afforded the electoral process by the Constitution. As the Supreme Court observed, "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974). The state has broad power to regulate the process of elections, but that power is limited by the strictures imposed by the First Amendment. *Tashjian v. Republic Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550 (1986).

The Supreme Court has set out the framework in which the constitutionality of state election laws is to be analyzed:

[The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the [c]ourt must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

*Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983) (Citations omitted.); *Eu*, 489 U.S. at 222, 109 S.Ct. at 1019-20. Moreover, "[t]o the degree that a State would thwart these [First and Fourteenth] interests by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 704 (1992) (Citations omitted.). However, that a state's system tends to limit the field of candidates from which the voters may choose is not dispositive of the question of the constitutionality of the statute. *Burdick v. Takushi*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2059, 2063 (1992). Rather, the inquiry is focused on the "extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.*

With this background in mind, the court now turns to an examination of the interests of the New Party which

are purportedly burdened by the state's disaffiliation statutes and the interests advanced by the state in justification of the statutes.

### C.

The New Party argues here that Minnesota's disaffiliation statute infringes upon its rights to select the candidate of its choice. There can be little doubt that at the core of the associational rights protected by the First and Fourteenth Amendments is the right of a political party to select "a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224. Nor can there be doubt that all electoral regulatory schemes impinge on "the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. In other words, a party's associational rights are not absolute and are subject to some degree of qualification.

Defendants argue that the resolution of this case is determined by reference to *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274 (1974). There, the Supreme Court upheld a California statute which prohibited the placement on election ballots of the names of persons running as independent candidates until one year after that person had disaffiliated from a political party. *Id.* at 736, 94 S.Ct. at 1282. The Court reasoned that the disaffiliation statute assured the "integrity of various routes to the ballot" and that the statute did not discriminate against independents. Ultimately, however, the Court rested its decision

on the state's interest in avoiding fractured elections; "[the disaffiliation rule] works against independent candidacies prompted by short-range political goals, pique, or personal quarrel." In short, the disaffiliation rule at issue in *Storer* was directed at "sore losers".

The issue before this court involves not a sore loser but, rather, a willing participant. Rep. Dawkins has expressed a willingness to appear on the ballot both as the New Party's candidate and as the candidate of another party. Indeed, Rep. Dawkins will appear on the ballot; he ran unopposed in his party primary. It appears to this court that that fact alone removes this case from the rationale of *Storer* as well as its reasoning.

The finding that *Storer* is not dispositive does not, however, end of the court's analysis. The challenged statutes burden plaintiff because it is denied the ability to place the name of its chosen candidate on the ballot. "[T]he rigorousness of our inquiry into the propriety of [these statutes] depends on the extent to which [they] burden[ ] First and Fourteenth Amendment rights." *Burdick v. Takushi*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2063.

The challenged statutes here prohibit a candidate from being the nominee, for a single office, of more than one party in a single election. Of critical import here is the fact that the New Party's associational rights are burdened only to the extent that they cannot nominate Rep. Dawkins, who has been nominated by another party. There is nothing in the cases of which this court is aware that requires a state to allow a single candidate to gather as many nominations as possible prior to the general election. The complaint centers on the New Party's desire

to narrow political opportunity by hitching their political cart to another party's star. If plaintiff wishes to run a candidate under their party's banner, they may do so by nominating any person, other than Rep. Dawkins, that it defines as its candidate.

Minnesota law provides New Party relative ease of access to the ballot. Minnesota requires that minor parties nominate their candidates by petition. Minn. Stat. §§ 204B.03, 204B.07. The number of signatures required to be on the nominating petition in this case was ten per cent of those persons voting in the last general election or "500, whichever is less". Minn. Stat. § 204B.08, Subd. 3(c). There is no requirement, as in *Anderson*, that the new party engage in rigorous and superhuman planning in order to access the ballot. Minnesota requires a minimal showing that there is sufficient interest in a candidate to justify his or her placement on the ballot. Minnesota also requires that the new or minor party nominate someone not affiliated with another party.

There is no allegation that the New Party was denied access to the ballot, *Norman*, 502 U.S. at \_\_\_, 112 S.Ct. at 704; rather, the New Party, solely because it chose as its candidate one chosen by another party as its candidate, was denied a place on the ballot because it had no properly qualified candidate. On that basis, the court finds that, like the total ban on write-in candidacies upheld in *Takushi*, Minnesota's ban on cross-filing is a reasonable politically neutral regulation which "serves merely to channel expressive activity at the polls". *Takushi*, 112 S.Ct. at 2066. Moreover, the court finds that the burden imposed upon plaintiff's First Amendment rights is not

so severe as to trigger a heightened scrutiny of the challenged statutes. *Norman*, 502 U.S. at \_\_\_, 112 S.Ct. at 704-05. (denial of access to ballot under statute prohibiting use of name of an established political party). Cf. *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992) (striking prohibition on non-party candidates being designated on ballot as "Independents"; error to apply strict scrutiny standard as burden was not denial of access, but minor burden.)

The next step in the *Anderson* analysis is to identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by the rule. The *Anderson* analysis requires that the court determine the legitimacy and strength of each interest and consider the extent to which these interests make it necessary to burden the plaintiff's rights.

#### D.

Defendants set out several interests which they argue justify the questioned statute here. Defendants rest their argument primarily on *Storer* and *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2992 (1992) and put forth several interests which they argue justify the restrictions at issue in this matter. Indeed, defendants set out those matters found sufficient in *Swamp* at length. In this case, however, defendants put forth two interests which the court finds compelling.

First, defendants assert that they have a strong interest in preventing ballot generated voter confusion. What plaintiffs seek is to place Rep. Dawkins' name on the

ballot with their party designation. Rep. Dawkins, however, is already on the ballot with another party's designation. Thus, if the court accepts the arguments of the plaintiffs, Rep. Dawkins will appear on the ballot twice, once as plaintiff's candidate and once as the candidate of a different party. The court finds this situation to be persuasive evidence that plaintiff's scheme will result in voter confusion; the state has a compelling interest in setting out a ballot in which all of the candidates are treated equally and which is a plain statement of the available choices. *Swamp*, 950 F.2d at 386.

Moreover, in presenting the candidates to the electorate, defendants have an equally compelling interest in knowing how the winner will be determined. *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 857 (1972). Plaintiffs set out a scheme where the all of Rep. Dawkins's votes will be aggregated into a single total, regardless of which party designation they are owed. The flaw in this scheme is that Rep. Dawkins, then, has the opportunity not only to be chosen twice but then to have his totals aggregated so that he could lose the election under either party designation, but he could still emerge victorious after the totals were aggregated. This court finds that the prohibition of such a situation constitutes a compelling reason, in and of itself, for the cross filing ban. *Swamp, Id.* (State has compelling interest in "assuring that the winner of an election is the choice of the majority of at least a plurality of the voters.")

## E.

The final step in the *Anderson* analysis is to weigh all the factors and decide whether the challenged statutes are unconstitutional. As described above, the challenged statutes do impose a minimal burden on the New Party's First Amendment rights to associate for the purpose of advancing the political rights of its members by limiting who can be the candidate of the New Party. In the final analysis, this court finds that the state has shown that its prohibition on multiple party candidacies for elective office is a valid and non discriminatory regulation of the electoral process. See *Storer*, 415 U.S. at 736, 94 S.Ct. at 1282 (maintenance of stable political system is compelling state interest); *Takushi*, 415 U.S. at \_\_\_, 112 S.Ct. at 2066-67 (prevention of unrestrained factionalism tied to relative ease of access to ballot constitutes a compelling state interest); *Swamp*, 950 F.2d at 386 (avoiding voter confusion is compelling state interest).

Plaintiff suggests that by preventing the New Party from nominating Rep. Dawkins, Minnesota has effectively burdened internal party operations. This is plainly not the case. Other than the restrictions placed on nominating candidates with other party affiliations, the New Party has the right to support whoever they want. Minnesota's election laws do not concern themselves with the political processes of the individual parties. Minnesota's interests are in protecting the integrity of the ballot box.

Finally, the court has found that there is a minimal burden placed on plaintiff by operation of the challenged statutes; the New Party is prohibited from choosing as its candidate the candidate of another party. The court has

also found that that minimal burden is justified by defendant's interests in preserving an electoral process which is fair and certain of resolution. It should be emphasized that this court does not view this case as involving denying plaintiff New Party access to the ballot, a situation which would trigger a stricter scrutiny of the challenged statutes. *See, Eu*, 489 U.S. at 222; *Norman*, 502 U.S. 279, 112 S.Ct. at 704. This case involves, rather, New Party's willingness to find another candidate who is not the candidate of another party. This court is of the opinion that the challenged statutes, even if reviewed under the stricter scrutiny called for by cases where the statutes have the effect of excluding a Party or candidate from the ballot, the statutes here pass muster.

More importantly, however, plaintiffs seek resolution of issues best resolved in the Legislature. It is apparent that issues concerning the mechanics of choosing candidates and the methods used in counting those votes, particularly where those issues are, in large part, matters of policy best left to the deliberative bodies themselves.<sup>3</sup> Here, there is no intrusion into the party's internal governance, no absolute prohibition on the party's participation in the electoral process, and no discrimination in the application of the challenged statutes. If plaintiffs wish to be allowed, as a matter of state law, to cross file, the state

---

<sup>3</sup> There are several states which permit the cross filing that is at issue in this case. *See, e.g., Conn.Gen. Stat. § 9-453t* (1990); *Mass. Gen. L., ch. 54 § 41* (1991); *N.H.Rev.Stat. Ann. § 659:68* (1990); *N.Y. Elec. Law § 6-146* (McKinney 1994); *25 Pa. Cons. Stat. § 3010(f)* (1989).

Legislature is the appropriate forum for resolution of that issue.

Accordingly, based on all the records, proceedings and arguments of the parties, **IT IS HEREBY ORDERED THAT:**

1. Summary Judgment is granted on behalf of Defendants.

DATED: September 16, 1994

/s/ Michael J. Davis  
Michael J. Davis  
United States  
District Court Judge

---

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

TWIN CITIES AREA NEW PARTY,	)	
757 Raymond Avenue, Suite 200A	)	
St. Paul, Minn. 55114	)	
(612) 282-7141,	)	
	)	Civil Action
Plaintiff,	)	No.
	)	
v.	)	
	)	
LOU McKENNA, Director, Ramsey	)	
County Department of Property	)	
Records and Revenue, and	)	
	)	
JOAN ANDERSON GROWE,	)	
Secretary of State of the State of	)	
Minnesota,	)	
	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

1. This action, brought under 42 U.S.C. § 1983, challenges the constitutionality of certain provisions of the Minnesota election law which prevent plaintiff, the Twin Cities Area New Party ("New Party" or the "Party"), from nominating a candidate for elective office if that candidate has already been nominated for that office by a major party. Plaintiff seeks declaratory and injunctive relief on the ground that this ban on cross-nominations violates plaintiff's associational rights as a political party under the First and Fourteenth Amendments to the United States Constitution.

Jurisdiction

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Venue is proper under 28 U.S.C. § 1391(b).

Parties

3. Plaintiff Twin Cities Area New Party is an affiliate of the New Party, a national political party with a progressive agenda and chapters in over a dozen states. Plaintiff was chartered as a chapter of the national party in 1993 and is based in St. Paul, Minnesota. Since its founding, plaintiff endorsed one candidate in the 1993 nonpartisan race for mayor of St. Paul; in 1994, it nominated one candidate for the state legislature and endorsed another state legislative candidate.

4. Defendant Lou McKenna is Director of the Ramsey County Department of Property Records and Revenue, in which capacity he is the principal county officer with duties relating to elections in Ramsey County under the Minnesota election law. He is sued here solely in his official capacity.

5. Defendant Joan Anderson Growe is Secretary of State of the State of Minnesota, in which capacity she is responsible for administering the Minnesota election law. She is sued here solely in her official capacity.

Facts

6. Earlier this year, Minnesota's two major parties acted to endorse candidates from among those who planned to run for various offices in the party primaries

to be held on 13 September 1994. One candidate endorsed by the Democratic-Farmer-Labor Party was incumbent State Representative Andy Dawkins, who represents District 65A in St. Paul. He is running unopposed in next month's DFL primary, and thus it is likely that he will appear on the November 1994 general election ballot as the DFL nominee.

7. In April 1994, the New Party held a nominating session, at which time the members voted to nominate Andy Dawkins as the New Party candidate for District 65A in the November 1994 general election. The Party also voted to endorse (but not formally nominate) another candidate running for State Representative from a Minneapolis district.

8. Under Minn. Stat. §§ 204B.03 and 204B.07, a minor party such as the New Party does not select candidates in a primary. Instead, it must file nominating petitions containing the requisite number of signatures for each candidate it has nominated.

9. In July 1994, the New Party gathered more than the requisite number of signatures on a nominating petition which would allow Rep. Dawkins to appear on the November 1994 ballot as the New Party candidate in District 65A.

10. On 18 July 1994, the New Party attempted to file in a timely fashion its nominating petition at the Ramsey County Department of Property Records and Revenue, which is responsible for the administration of elections held in that county.

11. An official at that Department refused to accept the New Party's nominating petition, however. Instead, Party representatives were handed a letter, also dated 18 July 1994 and signed by Joan M. Pelzer, Supervisor of Elections/Voter Registration, who was acting on behalf of defendant McKenna.

12. In her letter, Ms. Pelzer advised that she could not accept the New Party's nominating petition because Rep. Dawkins had previously filed an Affidavit of Candidacy as the DFL candidate for that seat. As authority for this action, Ms. Pelzer's letter cited Minn. Stat. § 204B.06, subdivision 1, which requires candidates to file affidavits of candidacy stating that the candidate "[h]as no other affidavit on file as a candidate for any office at the same primary or next ensuing general election."

13. Other parts of Minnesota's election law which both defendants enforce and administer also prevent plaintiff from cross-nominating candidates (such as Rep. Dawkins) who have been nominated by a major party. Thus, Minn. Stat. § 204B.04, subdivision 1, states with respect to major party candidates:

No individual shall be named on any ballot as the candidate of more than one major political party. No individual who has been certified by a canvassing board as the nominee of any major political party shall be named on any ballot as the candidate of any other political party at the next ensuing general election.

Subdivision 2 of that statute says in relevant part: "No individual who seeks nomination for any partisan office at a primary shall be nominated for the same office by nominating petition."

14. The enforcement of these statutes by defendant McKenna, as reflected by the Department's refusal to accept plaintiff's nominating petition, has prevented the New Party from placing its duly nominated candidate for State Representative from District 65A on the ballot in the November 1994 general election ballot.

15. Plaintiff plans to nominate candidates for office in the future, both for offices voted upon within one county, which are administered by county officials such as defendant McKenna, as well as offices which are filled by voters in more than one county, elections to which are administered by defendant Growe. In order to maximize its effectiveness as a minor political party, the New Party also plans to nominate candidates who have been nominated by a major party. The Party anticipates that some candidates who are nominated by a major party will accept the New Party endorsement if it is offered, as Rep. Dawkins did in 1994.

16. Defendants' enforcement of the statutes cited in this complaint is preventing and will prevent the New Party from pursuing a "fusion" strategy by cross-nominating candidates who have also been endorsed by a major party.

17. Plaintiff has suffered and is continuing to suffer irreparable injury as a result of defendants' enforcement of the cited statutes, which injury will continue absent relief from this Court.

### Cause of Action

18. Defendant McKenna's refusal to accept the nominating petition for the New Party's duly-chosen candidate for State Representative from District 65A, as well as his failure to place that candidate's name on the November 1994 as the candidate of the New Party, as well as the Democratic-Farmer-Labor Party, all in reliance on Minn. Stat. §§ 204B.06, subdivision 1, as well as defendants' enforcement generally of that provision and Minn. Stat. § 204B.04, subdivisions 1 and 2, violate plaintiff's associational rights as a political party under the First and Fourteenth Amendments to the United States Constitution.

19. Specifically, defendants' enforcement of these laws impinges on the New Party's rights to free political speech and association by restricting the Party's ability to select candidates for electoral office, thus hampering plaintiff's ability to spread its message among the electorate, identify candidates who best represent the Party's political preferences, and advance the purposes of its political association. The New Party has a right under the First and Fourteenth Amendments to nominate candidates for elective office even if those candidates have been nominated for that post by another party. There is no basis in law for refusing to accept plaintiff's nominating petition and to place plaintiff's candidate on the November ballot.

Prayer for Relief

WHEREFORE, plaintiff respectfully prays that this Court: (1) Declare that (a) Minn. Stat. § 204B.06, subdivision 1, violates the First and Fourteenth Amendments to the United States Constitution insofar as it prohibits a candidate from accepting the nomination of a minor political party as well as the nomination of a major political party for the same office; and (b) Minn. Stat. § 204B.04, subdivisions 1 and 2, violate the First and Fourteenth Amendments to the United States Constitution insofar as they prohibit plaintiff, as a minor political party, from nominating for elective office a candidate who has also been nominated for that office by a major political party.

(2) Preliminarily and permanently enjoin defendants from enforcing said statutes in a manner inconsistent with the declaration in paragraph (1) and from (a) taking any actions which would result in omitting from the November 1994 election ballot the name of Andy Dawkins as the candidate of New Party, as well as of the Democratic-Farmer-Labor Party, for State Representative in District 65A, and (b) refusing to cumulate votes cast for Rep. Dawkins on both party lines or to certify him as having been elected to legislative office, if he does in fact prevail in the November 1994 general election, on the ground that the candidate was in violation of Minn. Stat. §§ 204B.06, subdivision 1, and 204B.04, subdivisions 1 and 2.

(3) Award plaintiff its costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

(4) Grant such other and further relief as the Court may deem just and proper.

PUBLIC INTEREST PROJECT  
OF HAMLINE UNIVERSITY  
SCHOOL OF LAW

By: /s/ Kenneth E. Tilsen  
Kenneth E. Tilsen  
Hamline University  
School of Law  
1536 Hewitt Avenue  
St. Paul, MN 55104  
(612) 644-1744  
Attorneys for Plaintiffs

Of Counsel:  
Cornish F. Hitchcock  
Public Citizen Litigation Group  
2000 P Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 833-3000

Sara E. Siskind  
Davis, Miner, Barnhill & Galland, P.C.  
44 East Mifflin Street, Suite 803  
Madison, Wis. 53703  
(608) 255-5200

Dated: 10 August 1994

---

**Minn. Stat. § 204B.04, Subd. 2 (1994)**

**Candidates seeking nomination by primary.** No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.13, subdivision 4.

**Minn. Stat. § 204B.06, subd. 1 (1994)**

**FILING FOR PRIMARY; AFFIDAVIT OF CANDIDACY.**

Subdivision 1. **Form of affidavit.** An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

- (a) Is an eligible voter;
- (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election; and
- (c) Is, or will be on assuming the office, 21 years of age or more, and will have maintained residence in the district from which the candidate seeks election for 30 days before the general election.

An affidavit of candidacy must include a statement that the candidate's name as written on the affidavit for ballot designation is the candidate's true name or the name by which the candidate is commonly and generally known in the community.

An affidavit of candidacy for partisan office shall also state the name of the candidate's political party or political principle, stated in three words or less.

**Minnesota Senate File No. 2720, § 10**

**Sec. 10. [EFFECTIVE DATE.]**

This act is effective for the state primary election in 1996 and thereafter.

The amendments made by this act are suspended during any time that the decision of the eighth circuit court of appeals in Twin Cities Area New Party v. McKenna, No. 94-3417MN, is stayed or the mandate of the court is recalled. If the McKenna decision is reversed, the amendments made by this act expire and the prior law is reviewed. The purpose of this paragraph is to provide an orderly procedure for complying with the McKenna decision while retaining the prior law prohibiting simultaneous nominations to the extent permitted by the United States Constitution.